No. 22-585

IN THE

Supreme Court of the United States

HALIMA TARIFFA CULLEY, on Behalf of Herself and Those Similarly Situated, *Petitioner,*

v.

ATTORNEY GENERAL OF ALABAMA ET AL., *Respondents.*

LENA SUTTON, on Behalf of Herself and Those Similarly Situated as Described Below, *Petitioner,*

v.

TOWN OF LEESBURG, ALABAMA ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF AMICUS CURIAE OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITION FOR CERTIORARI

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QUESTION PRESENTED

In determining whether the Due Process Clause requires a State or local government to provide a post seizure probable cause hearing prior to a statutory judicial forfeiture proceeding and, if so, when such a hearing must take place, should district courts apply the "speedy trial" test employed in *United States v. $8,850*, 461 U.S. 555 (1983), and *Barker v. Wingo*, 407 U.S. 514 (1972), as held by the Eleventh Circuit or the three-part due process analysis set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), as held by at least the Second, Fifth, Seventh, and Ninth Circuits.

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

When an individual's property is seized, does due process place any burden on the government to justify the seizure pending a final merits determination? The Eleventh Circuit says "no," but every other Circuit to address the question has said "yes." This issue is of critical importance to every person in this country, and only this Court can intervene to correct the Eleventh Circuit's misguided approach.

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[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus curiae* to file this brief.

This is at least the third time in the last fifteen years that a petitioner has sought clarity from this Court regarding the level of procedural protection to which property owners are entitled after the government has pursued forfeiture but before it has determined the ultimate destination for that property. Twice before, the Court declined the opportunity to issue a merits decision on similar issues. *See Alvarez v. Smith*, 558 U.S. 87 (2009) (vacating as moot and remanding); *Serrano v. United States Customs & Border Prot.*, 141 S. Ct. 2511 (2021) (denying petition for writ of certiorari). Petitioners now ask the Court to address and correct the Eleventh Circuit's rejection of the consensus view that a forfeiture victim's right to a post-deprivation hearing is determined by the three-part test from *Mathews v. Eldridge*, 424 U.S. 319 (1975). The Eleventh Circuit rejected the *Mathews* test in favor of the "speedy trial" test employed in *Barker v. Wingo*, 407 U.S. 514 (1972). That decision was wrong and will continue to have a devastating impact on the most vulnerable members of society, who (not coincidentally) are the most frequent targets of civil forfeiture.

The Eleventh Circuit's failure to provide sufficient procedural protection in post-seizure hearings threatens the Due Process Clause's central guarantee: "that individuals whose property interests are at stake are entitled to notice and an opportunity to be heard." *Dusenbery v. United States*, 534 U.S. 161, 167 (2002). The Constitution further promises that the "opportunity to be heard must be granted at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

The harms that petitioners and others have experienced are real. They are most tangible in three ways. First, the civil forfeiture regimes in many States make it exceedingly difficult to obtain a prompt post-deprivation hearing. Second, the lengthy delays typical of forfeiture proceedings can be explained by the perverse incentives that animate those regimes. And third, the lack of a prompt hearing, together with the burdens associated with contesting a civil seizure, leave many innocent owners with no choice but to settle with State authorities to secure the return of at least a portion of seized property.

The Eleventh Circuit has failed to adopt the other Circuits' views relating to the minimum procedural protections required in post-seizure forfeiture proceedings. This undermines individuals' ability to, as then-Judge Sotomayor explained, "challenge the legitimacy of the [government's] retention of the vehicles while those proceedings are conducted." *Krimstock v. Kelly*, 306 F.3d 40, 68 (2d Cir. 2002). This Court should side with the majority of Circuits that have applied the *Mathews* test to "decid[e] whether the demands of the Due Process Clause are satisfied where the government seeks to maintain possession of property before a final judgment is rendered." *Id.* at 60.

The decision below fails for its reliance on an inapposite Circuit precedent, *Gonzales v. Rivkind*, 858 F.2d 657 (11th Cir. 1988), that arose in the distinct area of immigration-related forfeiture, not a State civil forfeiture regime. As this Court has explained since *Gonzales*, the *Mathews* test should be used to determine whether the "promptness and adequacy" of post-

deprivation proceedings comport with due process. *See United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

Justice Thomas has observed that "ambitious modern statutes and prosecutorial practices have all but detached themselves from the ancient notion of civil forfeiture." *Id.* at 85 (Thomas, J., concurring in part and dissenting in part). This case does not call for a wholesale evaluation of civil-forfeiture practice, but the Court should at least confirm that the *Mathews* test governs individuals' due process rights and their access to post-seizure probable cause hearings.

ARGUMENT

I. The Question Presented Is Exceptionally Important.

Under the Due Process Clause of the Fifth Amendment, States may not "depriv[e] any person of property without 'due process of law.'" *Dusenbery*, 534 U.S. at 167. "From these cryptic and abstract words," this Court has derived a central guarantee: "that individuals whose property interests are at stake are entitled to notice and an opportunity to be heard." *Id.* "It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." *Fuentes*, 407 U.S. at 80; *Mathews*, 424 U.S. at 333 (same).

These protections are "intended to secure the individual from the arbitrary exercise of the powers of government." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). In particular, the due process guarantee

serves to "protect [an individual's] use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property." *Fuentes*, 407 U.S. at 81.

Nowhere are these protections more important than in civil forfeiture schemes, when the affected party lacks many of the procedural guarantees afforded criminal defendants, and structural imbalances facilitate "arbitrary exercise of the powers of government." *Daniels*, 474 U.S. at 331. That is especially true when, as happened here, petitioners had to wait for more than a year to successfully assert an innocent owner defense to respondents' seizure of their vehicles. Pet.App.3a. Given the "particular importance of motor vehicles" owing to "their use as a mode of transportation and, for some, the means to earn a livelihood," *Krimstock*, 306 F.3d at 61 (Sotomayor, J.), the lack of a prompt post-deprivation hearing to challenge the seizure of a vehicle often imposes a severe hardship on innocent owners who are never accused of any wrongdoing.

Regrettably, petitioners' plight is far from uncommon. Indeed, there has been an explosion of forfeiture proceedings in recent decades. The numbers are staggering. In 2018 alone, 42 States, the District of Columbia, and federal agencies forfeited over $3 billion in property. *See* Lisa Knepper et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 5 (Institute for Justice 3d ed. 2020), https://ij.org/wp-content/uploads/2020/12/policing-for-profit-3-web.pdf. And vehicles are among the most frequent targets. In one county alone, local authorities sought to forfeit nearly

400 vehicles from its residents in 2017, without ever charging them with a crime. Tyler Arnold, *Wayne County Took Cars from 380 People Never Charged with A Crime*, Michigan Capitol Confidential (Oct. 27, 2018), https://www.michigancapitolconfidential.com/wayne-county-took-cars-from-380-people-never-charged-with-a-crime. These figures confirm that the resolution of this case will have a profound effect on how forfeiture proceedings are conducted and, most importantly, the protections afforded to individuals seeking to vindicate their property rights and avoid undue hardship.

1. The civil forfeiture regimes in many States make it exceedingly difficult to obtain a prompt post-deprivation hearing. Though all States allow for property owners to eventually challenge a forfeiture, many statutes do not provide any timeline for a hearing to occur. *See, e.g.*, Ala. Code § 20-2-93(l); D.C. Code §§ 41-302(b), -308(d)(1); La. Stat. Ann. § 40:2605; N.J. Stat. Ann. § 2C:64-5(b); N.C. Gen. Stat. § 75D-5(i); *see also* Knepper et al., *Policing for Profit* at 36-37 (summarizing innocent owner statutes).

Absent established procedures for a timely post-deprivation hearing, property owners are left with no meaningful ability to recover innocent property integral to their livelihood in a timely manner, even when the government has no basis for the seizure. Instead, the process serves only the States' own interests. But the States' incentives for proceeding in a timely manner are low, and the number of forfeiture proceedings is staggeringly high. Thus, in practice, innocent property owners, like petitioners here, typically wait

months—even years—before receiving a post-deprivation hearing to contest the legality of the seizure.

2. The lengthy delays before post-deprivation hearings are held can be explained by the perverse incentives that undergird modern forfeiture regimes.

Today, State and federal law enforcement agencies are entitled to a sizeable percentage of seized property. In fact, they derive so much income from forfeiture proceedings that some jurisdictions have cut law enforcement budgets and make up the difference with forfeited proceeds. *See* Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB ECON. 2113 (2007); *Policing and Profit*, 128 HARV. L. REV. 1723 (2015). One survey of more than 1,400 law-enforcement executives found that almost 40% of agencies identified civil forfeiture proceedings as *necessary* to fund their operations. John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171, 179 (2001). This fact is widely acknowledged, even by this Court. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989) ("[T]he Government has a pecuniary interest in forfeiture . . . . The sums of money that can be raised for law enforcement this way are substantial, and the Government's interest in using the profits of crime to fund these activities should not be discounted.").

The net effect of this dynamic is unsurprising. Law enforcement agencies have an incentive to (1) priori-

tize the enforcement of crimes that are likely to maximize forfeiture proceeds (e.g., drug cases), and (2) seize all property that is conceivably connected to a crime. When a law enforcement agency's budget depends heavily on proceeds from forfeiture proceedings, it exacerbates the temptation to seize all property with even a tenuous connection to a criminal offense, and to make it as difficult as possible to challenge the seizure.[2]

3. The lack of a prompt hearing, together with the burdens associated with contesting a civil seizure, leave many innocent owners with no choice but to settle with State authorities to secure the return of some portion of seized property.

When the government seizes valuable property—anything from a house, to money, personal effects, or, as in this case, a car—it naturally holds massive leverage over the property owner. Facing the prospect of years of litigation, unpredictable chances of success, and a steep resource imbalance, many owners—even innocent ones—conclude that the only rational choice is to let the government take some or all of their property. That leverage allows law enforcement agencies to secure extortionate settlement agreements, no matter how flimsy the basis for forfeiture.

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[2] Although the standard varies somewhat from State to State, in most cases the burden is on the owner to show that the property is not subject to forfeit. *See* Knepper at al., *Policing for Profit* at 170-86 (table collecting the burden of proof for the innocent owner defense).

To give a few prominent examples, a 2014 investigation by the Washington Post identified over one thousand cases of property owners being forced to sign settlement agreements to recover money seized by the federal government. Michael Sallah et al., *Stop and Seize*, The Washington Post (Sept. 6, 2014), https://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize/. The same report found that government officials routinely offered to drop forfeiture proceedings if the owner agreed to give up a portion of the proceeds. *Id.*

A similar dynamic is allegedly in play in Tenaha, Texas. There, authorities systematically used threats of criminal charges to pressure drivers into forfeiting cash taken during roadside seizures purportedly based on probable cause. Sarah Stillman, *Taken*, The New Yorker (Aug. 12 & 19, 2013), available at https://www.newyorker.com/magazine/2013/08/12/taken.

These examples are not outliers. The same injustices play out every day in jurisdictions across the country. *See generally*, Knepper et al., *Policing for Profit*.

* * *

Members of this Court,[3] legal scholars,[4] think-tanks,[5] and politicians,[6] have raised constitutional concerns about the dearth of procedural protections afforded to property owners in forfeiture proceedings. This case presents one of the chief concerns: the time it takes to provide a property owner with a post-deprivation hearing.

Although this Court has already recognized that due process provides "the right to notice and an opportunity to be heard . . . at a meaningful time and in a meaningful manner," *Fuentes*, 407 U.S. at 80, some doubt remains about the proper standard for lower courts to use in assessing whether an individual had his opportunity to be heard at a meaningful time. The lower courts are divided on this question. Thus, this Court should intervene to resolve the split and bring

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[3] *See Good*, 510 U.S. at 85 (Thomas, J., concurring in part and dissenting in part) ("[A]mbitious modern statutes and prosecutorial practices have all but detached themselves from the ancient notion of civil forfeiture.").

[4] *See, e.g.*, Stefan B. Herpel, *Toward A Constitutional Kleptocracy: Civil Forfeiture in America*, 96 MICH. L. REV. 1910 (1998).

[5] *See* Adam Bates, *An Illustrated Guide to Civil Asset Forfeiture*, Cato Institute (June 23, 2015), https://www.cato.org/blog/illustrated-guide-civil-asset-forfeiture.

[6] *See, e.g.*, *Federal Asset Forfeiture: Uses and Reforms: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Security, and Investigations of the H. Comm. On the Judiciary*, 114th Cong. 1, 3 (2015) (statement of Rep. James Sensenbrenner).

much needed clarity to an issue that has such far-reaching effects on property owners.

II. The Court Should Adopt *Mathews* over *Barker*.

Writing for the Second Circuit, then-Judge Sotomayor explained why *Mathews*'s three-factor test—rather than *Barker*'s speedy-trial test—should be used "in deciding whether the demands of the Due Process Clause are satisfied where the government seeks to maintain possession of property before a final judgment is rendered." *Krimstock*, 306 F.3d at 60. *Barker* addresses "the speed with which civil forfeiture proceedings themselves are instituted or conducted." *Id.* at 68. But *Mathews* "set[s] forth [the] factors to weigh in deciding whether the demands of the Due Process Clause are satisfied where the government seeks to maintain possession of property before a final judgment is rendered." *Id.* at 60. Thus, *Mathews* "should be used to evaluate the adequacy of process offered in post-seizure, pre-judgment deprivations of property in civil forfeiture proceedings." *Id.*

The Seventh Circuit agreed. It held that when a vehicle is seized by law enforcement, *Mathews* applies and requires a prompt, post-seizure retention hearing. *Smith v. City of Chicago*, 524 F.3d 834, 838-39 (7th Cir. 2008), *vacated and remanded sub nom. Alvarez v. Smith*, 558 U.S. 87 (2009). The Seventh Circuit also explained why this Court's cases applying *Barker* to customs forfeitures—*$8,850* and *Von Neumann*—do not govern cases like this. *Id.* at 837. First, *$8,850* "concern[ed] the speed with which the civil forfeiture

proceeding itself was begun," not "whether there should be some mechanism to promptly test the validity of the seizure." *Id.* And in *Von Neumann*, the latter issue was not even presented because customs law already "allowed procedures . . . to obtain a speedy release of [property] prior to the actual forfeiture hearing." *Id.*

Much more on point is this Court's decision in *Good*, 510 U.S. 43. In that civil forfeiture case, the Court considered "whether, in the absence of exigent circumstances, the Due Process Clause . . . prohibits the Government . . . from seizing real property without first affording the owner notice and an opportunity to be heard." *Id.* at 46. And the Court applied the *Mathews* test to conclude that it does. *Id.* at 53-59. The Second Circuit and the Seventh Circuit both properly relied on *Good* in holding that the *Mathews* test determines whether "a prompt postseizure retention hearing, with adequate notice, is required for motor vehicle seizures." *Smith*, 524 F.3d at 837; *see Krimstock*, 306 F.3d at 60.

The court below erred by applying inapposite Circuit precedent. In *Rivkind*, the Eleventh Circuit—relying on *$8,850* and *Von Neumann*—used the *Barker* test to evaluate the forfeiture scheme under the Immigration and Nationality Act of 1981. 858 F.2d at 661-62. That made sense because the procedures are practically indistinguishable from the customs forfeiture procedures addressed in *$8,850* and *Von Neumann*. *See* 8 U.S.C. § 1324(b)(2). As a result, the scheme "in effect" provides "relief similar" to "a prompt postseizure retention hearing." *Smith*, 524 F.3d at 837. But the court below held itself bound by *Gonzales* "to apply

Barker rather than *Mathews*" to this case, even though Alabama's civil forfeiture scheme includes no such protections. Pet.App.7a. That decision was wrong and cannot be reconciled with the Court's decision in *Good*, which applied the *Mathews* test to evaluate what process was due in order to "protect . . . use and possession of property from arbitrary encroachment" and "minimize substantively unfair or mistaken deprivations of property." *Good*, 510 U.S. at 53.

The realities of civil forfeiture further demonstrate the insufficiency of the *Barker* test in this context. *See Krimstock*, 306 F.3d at 53 ("The issues of a speedy trial and a prompt retention hearing are not parallel in this context."). "The application of the speedy trial test presumes prior resolution of any issues involving probable cause to commence proceedings . . . leaving only the issue of delay in the proceedings." *Id.* at 68. But without the ability to promptly challenge a seizure, the property owner must often wait a year or more to recover an invalidly seized car or other property. *Id.* at 53. And without access to transportation during that time, she may well lack "the means to earn a livelihood." *Id.* at 61. Faced with those burdens, to say that the eventual forfeiture proceeding "represents a meaningful opportunity to be heard at a meaningful time on the issue of the continued impoundment is to stretch the sense of that venerable phrase to the breaking point." *Id.* at 53.

Modern civil forfeiture statutes present grave constitutional concerns. As Justice Thomas wrote in his separate opinion in *Good*, "ambitious modern statutes and prosecutorial practices have all but detached

themselves from the ancient notion of civil forfeiture." 510 U.S. at 85 (Thomas, J., concurring in part and dissenting in part). Justice Thomas recently expanded on that sentiment and voiced skepticism that "this historical practice is capable of sustaining, as a constitutional matter, the contours of modern practice." *Leonard v. Texas*, 137 S. Ct. 847, 849 (2017) (Thomas, J., statement respecting denial of certiorari). He explained that "historical forfeiture laws were narrower in most respects than modern ones," and "[m]ost obviously, they were limited to a few specific subject matters, such as customs and piracy." *Id.*

In an appropriate case, the Court should evaluate the constitutional basis for modern civil forfeiture statutes. Until then, the Court should use this case to clarify that the Constitution at least protects an individual's right to challenge the legitimacy of the government's retention of property pending a final adjudication. Only that rule preserves the "fundamental" due process requirement of "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges this Court to grant the petition for certiorari.

Respectfully submitted,

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